

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Kelly Lyon	Team: Squad #10	CCRB Case #: 201810785	<input type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Saturday, 12/29/2018 2:30 PM	Location of Incident: West 49th Street and Rockefeller Center Plaza	Precinct: 18	18 Mo. SOL 6/29/2020	EO SOL 2/13/2021	
Date/Time CV Reported Sat, 12/29/2018 6:01 PM	CV Reported At: CCRB	How CV Reported: On-line website	Date/Time Received at CCRB Sat, 12/29/2018 6:01 PM		

Complainant/Victim	Type	Home Address

Witness(es)	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. CPT Thomas Smith	00000	939495	MTN PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Christian Desandis	26714	965043	013 PCT
2. POM Eduardo Molina	10137	954143	013 PCT

Officer(s)	Allegation	Investigator Recommendation
A.CPT Thomas Smith	Discourtesy: Captain Thomas Smith spoke discourteously to § 87(2)(b)	
B.CPT Thomas Smith	Abuse: Captain Thomas Smith threatened to seize § 87(2)(b)'s property.	
C.CPT Thomas Smith	Abuse: Captain Thomas Smith threatened to issue summonses to § 87(2)(b)	
D.CPT Thomas Smith	Discourtesy: Captain Thomas Smith spoke discourteously to § 87(2)(b)	
E.CPT Thomas Smith	Abuse: Captain Thomas Smith took photographs of § 87(2)(b)	

### Case Summary

On December 29, 2018, § 87(2)(b) filed this complaint with the CCRB online.

On December 29, 2018, at approximately 2:30 p.m., § 87(2)(b) and § 87(2)(b) were street vending on the north side of West 49<sup>th</sup> Street between Rockefeller Plaza and 5<sup>th</sup> Avenue in Manhattan. § 87(2)(b) and § 87(2)(b) are art vendors and their tables were set up approximately 20 to 30 feet apart. Captain Thomas Smith, of the Midtown North Precinct, allegedly told § 87(2)(b) to “pack his shit up” (**Allegation A: Discourtesy – Discourteous language**, § 87(2)(g)). Captain Smith then walked over to § 87(2)(b) and allegedly told him that if he did not close his stand, his property would be seized (**Allegation B: Abuse of Authority – Threat to seize property**, § 87(2)(g)). Several minutes later, § 87(2)(b) was finishing a transaction while closing his table and Captain Smith allegedly threatened to issue § 87(2)(b) multiple summonses (**Allegation C: Abuse of Authority – Threat of summons**, § 87(2)(g)). At approximately 3:20 p.m., § 87(2)(b) was still at the location waiting for a hand truck to move his belongings. § 87(2)(b)'s belongings were packed, but he had not left either. Captain Smith instructed PO Christian Desandis and PO Eduardo Molina, of the 13<sup>th</sup> Precinct, to issue § 87(2)(b) and § 87(2)(b) summonses. As Captain Smith was walking away from § 87(2)(b), Captain Smith allegedly said, “shit” (**Allegation D: Discourtesy – Discourteous language**, § 87(2)(g)). Captain Smith took six photos of § 87(2)(b) on his Department issued smartphone during the incident (**Allegation E: Abuse of Authority – Photography**, § 87(2)(g)). § 87(2)(b) and § 87(2)(b) left after receiving their summonses. § 87(2)(b) and § 87(2)(b) were both issued summonses for failure to move under exigent circumstances (**BR 01 and BR 02**).

§ 87(2)(b) provided the investigation with four cell phone videos that he took of the incident (**BR 03, BR 04, BR 05, and BR 06**), one of which (**BR 04**) captures Captain Smith instructing PO Desandis to issue § 87(2)(b) two summonses and another (**BR 03**) captures Captain Smith taking a photo of § 87(2)(b) on his Department issued smartphone. PO Desandis's and PO Molina's body-worn camera videos (**BR 07 and BR 08**) were obtained by the investigation. RCPI Landmark Properties provided two surveillance videos (**BR 09**) and LMSI provided one surveillance video (**BR 10**). All three surveillance videos capture the surroundings and conditions of the location, but do not explicitly capture the individuals involved in the incident.

### Findings and Recommendations

**Allegation (A) Discourtesy: Captain Thomas Smith spoke discourteously to § 87(2)(b)**

**Allegation (D) Discourtesy: Captain Thomas Smith spoke discourteously to § 87(2)(b)**

It is undisputed that on December 29, 2018, between 2:20 p.m. and 2:30 p.m., Captain Smith approached § 87(2)(b) and § 87(2)(b) separately and instructed them to leave because of exigent circumstances. § 87(2)(b)'s and § 87(2)(b)'s stands were placed approximately 20 to 30 feet away from one another. There was heavy pedestrian traffic on the sidewalk and the street was closed off to vehicle traffic to help compensate for the volume of pedestrians.

§ 87(2)(b) consistently stated (**BR 11, BR 12, and BR 13**) that he was vending art when Captain Smith approached him and told him to leave. Captain Smith was alone when he initially approached § 87(2)(b). § 87(2)(b) added in his verified statement (**BR 13**) that Captain Smith said, “Pack your shit up, I’ve told you before,” on his initial approach.

§ 87(2)(b) stated (**BR 14 and BR 15**) that Captain Smith approached and told him to close his stand and leave because there were too many pedestrians. § 87(2)(b) initially stated

(BR 14) that when he finished closing his stand he walked over to § 87(2)(b) and Captain Smith said, “You are a piece of shit.” In his verified statement (BR 15), § 87(2)(b) stated that he first became aware of Captain Smith because he could hear him speaking loudly to § 87(2)(b) from his own stand, but he was unable to describe what Captain Smith was saying. Captain Smith walked over to § 87(2)(b) and instructed him to leave. Captain Smith turned away from § 87(2)(b) took a few steps, and said, “Shit.” § 87(2)(b) clarified that he never heard Captain Smith say the phrase, “You’re a piece of shit.”

§ 87(2)(b) one of the other street vendors who was working on December 29, 2018, stated (BR 16) that he was at least 30 or 40 feet away from § 87(2)(b) and § 87(2)(b) so he was unable to hear or see any officers interact with § 87(2)(b) or § 87(2)(b).

The CCRB was unable to obtain any statements from § 87(2)(b) (BR 17), who was also working as a street vendor on December 29, 2019.

Captain Smith stated (BR 18) that he was working alone on Rockefeller Center Christmas Tree security detail when he approached § 87(2)(b) and several other vendors on West 49<sup>th</sup> Street and informed each of them that they had to leave the location due to exigent circumstances. Captain Smith did not recall saying, “Pack your shit up,” or using any other profanities at any point during the incident. Captain Smith stated that he “does not normally use that kind of language.”

Neither § 87(2)(b) or § 87(2)(b) were close enough to one another to clearly hear what Captain Smith was saying to each individual when they were at their own stands. § 87(2)(b)'s statements were inconsistent. There was no video evidence which captures the initial contact between Captain Smith and either § 87(2)(b) or § 87(2)(b). Captain Smith does not use any profanity throughout any of the cellphone videos or the body-worn camera videos.

§ 87(2)(g)

**Allegation (B) Abuse of Authority: Captain Thomas Smith threatened to seize § 87(2)(b)'s property.**

It is undisputed that Captain Smith approached § 87(2)(b) and instructed him to leave because of exigent circumstances. § 87(2)(b) did not leave immediately, and Captain Smith informed him that if he did not pack his belongings and leave then his property would be removed.

§ 87(2)(b) stated (BR 15) that when Captain Smith first told him to close his stand and leave, § 87(2)(b) told Captain Smith that he would close later and asked for an explanation as to why he needed to leave at that time. § 87(2)(b) did not think the area was too crowded. Captain Smith told § 87(2)(b) that if he did not leave, he would call the unit that oversees street vendors and instruct them to remove § 87(2)(b)'s property.

Captain Smith's statement (BR 18) was consistent with § 87(2)(b)'s in regards to informing § 87(2)(b) that his property would be removed if he did not leave. However, Captain Smith stated that there was heavy pedestrian traffic and large crowds of people.

Captain Smith also provided a photo (BR 23) that he took of § 87(2)(b) and the surrounding area during the incident. The photo did not capture § 87(2)(b) but it did capture the large volume of pedestrians at the location.

Surveillance footage (found in IAs 84 and 86; see IA 114 for screenshots (**BR 09**)), captured the conditions of the location from 2:00 p.m. to 4:00 p.m. Although the footage did not explicitly capture the individuals involved in the incident, the video showed heavy pedestrian traffic on West 49<sup>th</sup> Street which overflowed from the sidewalk into the street. The video captured the duration of the incident and the volume of pedestrian traffic remained consistent throughout.

Patrol Guide procedure 218-39: *Seizure, removal, and disposition of property from general and food vendors* (**BR 20**), states that exigent circumstances, for the purpose of this procedure, include any situation which may endanger the public safety or obstruct the free flow of traffic, pedestrian or vehicular. When exigent circumstances exist, uniformed members of the service are to notify vendors to stop all selling at the location and, within one minute, begin to move from the area. If a uniformed member of the service observes a general vendor in violation of the general vendor laws and regulations, they are permitted to seize and remove property.

§ 87(2)(g)

**Allegation (C) Abuse of Authority: Captain Thomas Smith threatened to issue summonses to § 87(2)(b)**

It is undisputed that Captain Smith instructed PO Desandis to issue § 87(2)(b) a summons for failure to move under exigent circumstances (**BR 01**). It is also undisputed that Captain Smith originally instructed PO Desandis to write § 87(2)(b) two summonses. The number of summonses that Captain Smith told § 87(2)(b) he would receive is disputed.

§ 87(2)(b) consistently stated (**BR 11**, **BR 12**, and **BR 13**) that Captain Smith threatened to issue him multiple summonses. § 87(2)(b) stated that when Captain Smith first approached him, Captain Smith told him to leave because of exigent circumstances. § 87(2)(b) finished helping a customer and began closing his stand. Captain Smith returned five minutes later and told § 87(2)(b) that if he did not leave he would be issued a summons. Captain Smith spoke to an unidentified officer, who § 87(2)(b) believed was part of the Peddler Unit, and § 87(2)(b) stated that it was his First Amendment right to sell art. Captain Smith said, “Keep running your mouth and see how many summonses you will get.” Captain Smith told § 87(2)(b) he would get a summons at least five times. § 87(2)(b) only received one summons for failure to move under exigent circumstances.

During a follow up phone call (**BR 21**) and during his in-person statement (**BR 13**), § 87(2)(b) added that on January 6, 2019, at approximately 2:20 p.m., in the same location, he encountered Captain Smith again while vending art at his stand. § 87(2)(b) stated that on this day he was issued a summons for vending on a table that was too large. § 87(2)(b) stated that officers told him that the rack on his table made the display too large. The summons (**BR 22**) was for violating NYC Administrative Code § 20-465 (n).

Captain Smith stated (**BR 18**) that on December 29, 2018, at approximately 2:20 p.m., he informed all of the street vendors working on West 49<sup>th</sup> street to leave because of exigent circumstances and only § 87(2)(b) and § 87(2)(b) failed to comply. Captain Smith told § 87(2)(b) that if he did not leave he would be issued a summons. Approximately 50 minutes later, § 87(2)(b) had still not left the location so Captain Smith instructed PO Desandis to issue him a summons for failure to move under exigent circumstances. Captain Smith stated to the CCRB that

if he had told § 87(2)(b) he would have been issued multiple summonses, then he would have gotten them. Captain Smith stated that § 87(2)(b) could have received summonses for failing to comply, creating a hazardous condition, or obstructing pedestrian traffic.

The cellphone video footage found in IA 18 (**BR 04**), captured Captain Smith instructing PO Desandis to write § 87(2)(b) a summons for disorderly conduct in addition to the summons for failure to move under exigent circumstances. PO Desandis's body-worn camera found in IA 52 (**BR 07**), captured Captain Smith saying, "Give him the failure to move, don't worry about the dis con," to PO Desandis. Both videos were shown to Captain Smith during his interview at the CCRB. Captain Smith stated that he did not recall changing his instructions to PO Desandis, but he has in the past changed his mind and lessened consequences when issuing people summonses.

The photo (**BR 23**) that Captain Smith provided showed § 87(2)(b) standing at his table. § 87(2)(b)'s artwork is attached to racks which sit upon his table. The display appears to be approximately the same height as § 87(2)(b). § 87(2)(b) stated to the CCRB that he is 6'4" tall and his New York State driver license lists him at 6'3" tall (**BR 24**).

Patrol Guide procedure 218-39: *Seizure, removal, and disposition of property from general and food vendors* (**BR 20**), states that when a uniform member of service observes a general vendor who is operating in violation of the General Vendor law or regulations they are to issue a Civil Summons returnable to the Office of Administrative Trials and Hearings.

NYC Administrative Code § 20-465 (n) (**BR 25**): States that no general vendor display may exceed five feet in height from ground level.

§ 87(2)(g)

#### **Allegation (E) Abuse of Authority: Captain Smith took photographs of § 87(2)(b)**

It is undisputed that Captain Smith photographed § 87(2)(b) during the incident on his department issued smartphone.

In the cellphone video provided by § 87(2)(b) found in IA 17 (**BR 03**), Captain Smith appeared to be taking a photo on a cellphone at 1:49 minutes in the recording.

Captain Smith stated that he took six photos during the incident, one of which was obtained by the investigation (**BR 23**). Captain Smith stated that he took the photos to illustrate the conditions that constituted exigent circumstances during the incident.

Operations Order No. 20 Use of Department Smartphones and Tablets (**BR 26**) states that members of service are permitted to use their department smart phones during all enforcement encounters where there is reason to believe that the individual is committing a violation for which a summons may be issued.

§ 87(2)(g)

#### **Civilian and Officer CCRB Histories**

- This is the first CCRB complaint to which § 87(2)(b) has been a party (**BR 27**).
- This is the first CCRB complaint to which § 87(2)(b) has been a party (**BR 28**).
- Captain Smith has been a member of service for 13 years and has been a subject in eight CCRB complaints and 23 allegations five of which were substantiated.

- 201307074 involved substantiated allegations of an entry and discourteous language against Captain Smith. The Board recommended Instructions and the NYPD imposed Instructions.
- 201609182 involved substantiated allegations of force, a frisk, and a search of person against Captain Smith. The Board recommended Command Discipline B and the NYPD imposed Formalized Training.

**Mediation, Civil and Criminal Histories**

- § 87(2)(b) declined to mediate this complaint.
- § 87(2)(b) [REDACTED]
- § 87(2)(b) [REDACTED]
- § 87(2)(b) [REDACTED]
- As of May 31, 2019, the New York City Office of the Comptroller has no record of a Notice of Claim being filed in regards to this complaint (**BR 31**).

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Squad No.: 10

Investigator: \_\_\_\_\_

Signature	Print Title & Name	Date
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Squad Leader: \_\_\_\_\_

Signature	Print Title & Name	Date
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Reviewer: \_\_\_\_\_

Signature	Print Title & Name	Date
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